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No. 84-1270

In the Supreme Court of the United States

OCTOBER TERM, 1984

CARPENTERS LOCAL UNION NO. 35, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the National Labor Relations Board properly found, in the circumstances of this case, that petitioner had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging two member-employees because they had complained to the Department of Labor about a union official's misuse of union funds and irregularities in union election proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 739 F.2d 479. The decision and order of the National Labor Relations Board (Pet. App. A11-A29) and the decision of the administrative law judge (Pet. App. A30-A54) are reported at 264 N.L.R.B. 795.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1984. A petition for rehearing was denied on November 20, 1984 (Pet. App. A10). The petition for a writ of certiorari was filed on February 5, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Carpenters Local Union No. 35 (the Union) represents employees in Marin County, California (Pet. App. A12, A32). The Union is governed by a ten-member Executive Board which is elected by the membership (*id.* at A12-A13, A33). Two members of the Executive Board, the Financial Secretary, who manages the Union office, and the Business Representative, who administers the Union's contracts, are full-time paid employees of the Union. The Union also employs selected union members as assistant business representatives. *Id.* at A13, A33, A35. During the period relevant to this case, union members Klaus Martin and William Prescott were employed by the Union as assistant business representatives — Martin since 1975 and Prescott since June 1978. Additionally, during the period from July 1977 to July 1979, Martin and Prescott each held elective office in the Union, as Trustee and Conductor, respectively, and in those capacities both were members of the Executive Board. *Ibid.*

As a trustee, Martin was responsible, along with the other two Trustees, for supervising the handling of Union funds. In the course of his duties, Martin became concerned about the manner in which Union Financial Secretary William Wilson handled certain union funds. Pet. App. A13-A14, A36-A39. Specifically, Martin questioned several improprieties: (1) Wilson's choice of an accounting firm to audit the Union's books that had failed to discover a major embezzlement at another of the firm's customers; (2) Wilson's payment of retired members' dues from union funds, in violation of the International Constitution; (3) Wilson's reimbursement of the expenses incurred by an apparently unauthorized delegate for a District Council meeting; (4) Wilson's refusal to transfer certain Union funds to higher interest bearing accounts; and (5) Wilson's creation of a separate "welfare fund" account for union funds that was

not readily subject to oversight by the Trustees, as well as his handling of a specific donation for the welfare of the Union's members (*ibid.*). Martin raised these issues at regular union membership meetings and at Executive Board meetings between January and April 1979. Although Martin frequently clashed with Wilson over these matters, other members, including Prescott, supported Martin (*ibid.*).

In May 1979, one month before the upcoming union election, Martin and Prescott also contacted the United States Departmemnt of Labor (DOL) to complain that the Union had mishandled various funds, that irregularities had occurred in the election nominating process, and that members not in good standing would be allowed to vote in an upcoming election. Pet. App. A15, A39. The DOL told Martin and Prescott that it would take no action on their election complaints until they had exhausted their internal union complaint procedures. With respect to the allegations of misuse of union funds, the DOL advised Martin and Prescott that further substantiation would be needed. *Ibid.* Consequently, over the next few months, Martin and, occasionally, Prescott and other union members met several times with DOL investigators regarding the allegations of fund misuse. Martin also requested a credit check from the Marin County Credit Association as to whether Wilson had any personal loans or other business dealings with banks in which union funds were deposited to determine whether Wilson had a conflict of interest. Upon learning of the credit check, Wilson became quite irate. *Id.* at A15-A17, A42.

As the result of the union elections held on June 7, 1979, Wilson was reelected to the position of Financial Secretary, while Martin was defeated and Prescott was declared ineligible for Union office because he had been delinquent in his dues within the past twelve months (Pet. App. A15-A16, A39). On June 21, an attorney representing Martin, Prescott, and four other union members sent a letter to the

International Union protesting specific aspects of the June 7 election. The letter was signed by all the protesting union members. *Id.* at A16, A39.

Early in July, Prescott requested that his appointment as Assistant Business Representative, which had expired on June 30, be extended (Pet. App. A16). At that time, Prescott was working as many as 80 hours per week, because Martin, who two months earlier had been assaulted and disabled in the course of his duties, was unable to work at all (*id.* at A15, A46). However, the Executive Board voted not to renew Prescott's appointment, on the ground that a second assistant business representative was not needed at that time (*id.* at A16, A46).

On July 17, the next regular membership meeting, the June 21 letter of protest signed by Martin, Prescott, and four other union members was read aloud to the membership. The recording secretary also read the names of all the signatory members, denouncing them as "troublemakers." Pet. App. A16 & n.10, A39. On July 30, the International Union denied the challenges to the June 7 election, and the protesting members responded by disclosing additional details of alleged election and financial improprieties. After the International reaffirmed its prior determination, the protesting members filed formal charges with the DOL alleging irregularities in the conduct of the June 7 election as well as the misuse of union funds. *Id.* at A17.

At a regular union meeting on September 4, Wilson moved that Martin be discharged from his position as Assistant Business Representative. In support of the motion, Wilson pointed to Martin's request for a credit report on him. Pet. App. A17 & n.12, A41-A42. In addition, the Business Representative, Clarence Murfin, stated that, because of the activity of certain members sitting in the room, "the government was coming into the office" the next

day. (A DOL investigator was scheduled to meet with union officials the next day regarding the complaints filed by Martin and Prescott.) The membership then voted to dismiss Martin (*id.* at A17, A43).

The next day, Business Representative Murfin told Martin that he had been fired "for going to the government and investigating Bill Wilson" (Pet. App. A43). Moreover, in October, Wilson told another union member that Martin and Prescott were fired because they "had gone to the Department of Labor and filed charges" (*id.* at A47).

2. Adopting the factual findings but not the legal conclusions of the administrative law judge (ALJ), the Board found that the Union had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging Martin and Prescott because they had complained to the DOL about Wilson's misuse of union funds and irregularities in union election proceedings. The Board further found that the Union had also violated Section 8(a)(1) by discharging Martin because he had initiated a credit investigation of Wilson in connection with the DOL complaint (Pet. App. A11-A25). In so finding, the Board rejected the ALJ's conclusion that Martin's and Prescott's conduct was unprotected because they were merely acting in their capacity as employees to effect a change in management hierarchy. The Board found, instead, that Martin and Prescott were acting as members (and, in Martin's case, also as an officer) of the Union to expose what they believed to be corrupt internal union practices and thereby to maintain the Union's integrity as their collective-bargaining representative (*id.* at A21-A22 nn.18-19). The Board ordered the union to cease and desist from the unfair labor practices it had found, to reinstate Martin and Prescott to their former Union positions, and to award them backpay (*id.* at A22-A23).

3. The court of appeals upheld the Board's decision and enforced the Board's order (Pet. App. A1-A9).* The court agreed with the Board that Martin and Prescott, in complaining to the DOL, were engaged in concerted activity for the purpose of "mutual aid or protection" within the meaning of Section 7 of the Act, because "they were attempting to 'protect the integrity of their collective bargaining representative' " (*id.* at A6). The court explained that, "by seeking assistance from the DOL for alleged election and fund irregularities[,] * * * Martin and Prescott 'were * * * taking action of the sort that was reasonably likely to benefit both themselves and their fellow carpenters' " (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

Petitioner does not challenge the Board's finding, upheld by the court of appeals, that Martin and Prescott, by contacting the DOL, sought to protect "the integrity of their collective-bargaining representative by exposing what they believed to be corrupt internal union practices" (Pet. App. A22 n.19). Rather, petitioner contends (Pet. 5) that Martin's and Prescott's conduct was unprotected on the ground that it was not directly related to "their own wages, hours or other terms and conditions of employment," but was related to activities of their union only as a labor organization. This fact-bound contention does not warrant further review.

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* The Board sought enforcement only of those portions of its order that required the Union to cease and desist from its unlawful conduct and to reinstate Prescott with backpay. Martin had already settled with the Union concerning his reinstatement and backpay (Pet. App. A4).

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection*" (emphasis added). As this Court recognized in *Eastex, Inc.* v. *NLRB,* 437 U.S. 556, 564 (1978), the activities protected by Section 7 are not limited to those intended to affect the immediate employer-employee relationship. Rather, the "mutual aid or protection" clause of Section 7 encompasses a broad range of other activities as well. See 437 U.S. at 565-566 & nn. 14-15 (collecting cases). Thus, it is well settled that Section 7 protects the right of union members to criticize the policies of their union and to resort to administrative and judicial forums in an effort to change those policies and that an employer who retaliates against its employees for engaging in such activities thereby violates Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1). See, *e.g., NLRB* v. *Transcon Lines,* 599 F.2d 719, 720-721 (5th Cir. 1979); *Aztech Electric, Inc.,* 244 N.L.R.B. 924, 927 (1979), enforced, 634 F.2d 635 (9th Cir. 1980). Moreover, as the Board recognized (Pet. App. A21 n.18), because a union, as an employer, must respect its members' rights under Section 7 of the Act (see *Office Employees International Union* v. *NLRB,* 353 U.S. 313 (1957)), it is also clear that a union violates Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by retaliating against its members for engaging in protected activities. See, *e.g., Hoisting & Portable Engineers, Local 4,* 189 N.L.R.B. 366, 374 (1971), enforced 456 F.2d 242, 243 (1st Cir. 1972); *NLRB* v. *Local 212, UAW,* 690 F.2d 82, 84-85 (6th Cir. 1982); cf. *Helton* v. *NLRB,* 656 F.2d 883 (D.C. Cir. 1981). As this Court explained in *NLRB* v. *Marine Workers,* 391 U.S. 418, 424 (1968) (footnote omitted), because "there should be as great a freedom to ask the Board for relief as there is to

petition any other department of government for a redress of grievances[,] [a]ny coercion used to discourage, retard, or defeat that access is beyond the legitimate interests of a labor organization."

Applying these principles here, the Board and the court of appeals correctly held that Martin and Prescott, by seeking assistance from the DOL for alleged election and fund irregularities, were engaged in concerted activity for the purpose of "mutual aid or protection" within the meaning of Section 7 of the Act because they were attempting to "protect the integrity of their collective bargaining representative" (Pet. App. A6). The happenstance that the Union retaliated against them in its capacity as their employer —by discharging them from their jobs as assistant business representatives — does not alter the protected nature of their actions.

Petitioners err in relying (Pet. 5-6) on the Board's so-called "patronage" decisions, which hold that newly-elected union officers may dismiss existing employees and install their own supporters. Those decisions rest upon the dual principles that a union may properly demand loyalty from and the cooperation of its employees and that a union employee, like any other employee, has no protected right to engage in activities designed solely to influence or alter the management hierarchy. Those principles, as the court of appeals correctly observed (Pet. App. A8), have no application to this case, because a union lacks a legitimate interest in shielding itself from a member's allegations that the union has engaged in illegal conduct. See *NLRB* v. *Marine Workers,* 391 U.S. at 424; page 7, *supra.*

Finally, contrary to petitioner's assertion (Pet. 6), the Board's decision in this case is not inconsistent with *Finnegan* v. *Leu*, 456 U.S. 431 (1982). That decision, like the Board's "patronage" decisions, merely held that a newly-elected union president does not violate the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 401, by discharging member-business agents who supported the defeated candidate. *Finnegan* did not consider whether a union would violate the LMRDA by discharging member-employees in retaliation for exercising rights guaranteed under Title I of the LMRDA, a situation analogous to that presented here (see 456 U.S. at 440-441). Moreover, the court of appeals correctly recognized (Pet. App. A7) that Section 8(a) of the National Labor Relations Act, unlike the LMRDA, protects a union member's status as an employee and his right to engage in collective activity. As the Sixth Circuit held in *NLRB* v. *Local 212, UAW* (690 F.2d at 85), "*Finnegan* * * * does not in any way diminish protection for concerted activity under the [National Labor Relations Act]." Accordingly, petitioner's reliance upon *Finnegan* is misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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